

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

08 CIV 3863

XACTA 3000, INC.,

Plaintiff,

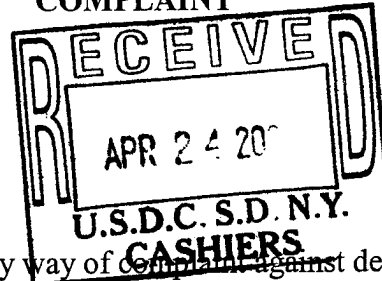
v.

TV MARKETPLACE LLC d/b/a  
YOUR STORE ONLINE,

Defendant.

Civil Action No.

COMPLAINT



Plaintiff XACTA 3000, INC. ("Xacta"), by way of complaint against defendant

TV MARKETPLACE LLC d/b/a YOUR STORE ONLINE, alleges that:

1. This is an action for trademark infringement, unfair competition and false designation of origin in violation of Section 43(a) of the United States Trademark Act of 1946, as amended, 15 U.S.C. §1125(a); for related claims of common law trademark infringement, unfair competition and misappropriation; and for unfair and deceptive trade practices in violation of New York Gen. Bus. Law §349.

2. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. §1121, 28 U.S.C. §§1331, 1338(a) and (b), and 1367.

3. Venue is proper in this judicial district under 28 U.S.C. §1391(b) and (c).

4. Plaintiff Xacta is a corporation organized and existing under the laws of the State of New Jersey, having a place of business located at 1955 Swarthmore Avenue, Suite 3, Lakewood, New Jersey 08701.

5. Upon information and belief, TV Marketplace LLC ("TVM") is a limited liability corporation organized and existing under the laws of the State of Wisconsin, having a place of business located at 17125 C West Bluemound Road, Brookfield, Wisconsin 53005 and/or at 18960 W Greenfield Avenue, Brookfield, Wisconsin 53045.

6. Upon information and belief, TV Marketplace LLC is doing business as Your Store Online (“Your Store”).

7. Xacta and/or its predecessor has continuously sold toxin collecting foot pads, in interstate commerce, under the trademark KINOKI, since at least as early as March, 2006. Since the first use thereof by Xacta, the KINOKI mark has come to be recognized and relied upon by the public as identifying Xacta and the toxin collecting foot pads which it sells. The mark KINOKI has therefore come to represent valuable goodwill belonging to Xacta.

8. Upon information and belief, at the Internet website www.yourstoreonline.net, Your Store offers for sale, sells and has sold toxin collecting foot pads under the name KINOKI. Attached hereto as Exhibit A are pages printed from the website www.yourstoreonline.net depicting the use of the KINOKI trademark in connection with the offer for sale of toxin collecting foot pads. Upon information and belief, TVM is the owner of and/or the operator of the Internet website www.yourstoreonline.net.

9. Xacta has not authorized TVM or Your Store to use the KINOKI trademark. Upon information and belief, the toxin collecting foot pads offered for sale under the KINOKI mark are not genuine KINOKI toxin collecting foot pads.

10. TVM and/or Your Store’s unauthorized use of the KINOKI trademark in connection with the sale of toxin collecting foot pads has been and continues to be in bad faith.

11. The wrongful use of the KINOKI trademark by TVM and/or Your Store to sell counterfeit KINOKI brand toxin collecting foot pads wrongfully diverts consumers

away from Xacta's genuine KINOKI brand toxin collecting foot pads, resulting in lost sales and injury to Xacta's reputation and goodwill.

12. Upon information and belief, TVM is transacting business in this judicial district, has wrongfully used the KINOKI trademark in this judicial district, and has committed other unfair acts in this judicial district.

13. TVM's conduct as described herein is directed to residents in this judicial district.

### **COUNT I**

(Trademark Infringement, Unfair Competition and False Designation of Origin)

14. Xacta hereby repeats and re-alleges paragraphs 1 through 13 above as if fully set forth herein.

15. TVM and/or Your Store's use, in commerce, of the trademark KINOKI, in connection with the offer for sale and sale of toxin collecting foot pads, is identical to Xacta's KINOKI trademark used in connection with toxin collecting foot pads, so as to be likely to cause confusion and mistake and to deceive and to make the public believe that such toxin collecting foot pads originate from Xacta and are genuine KINOKI brand toxin collecting foot pads.

16. The aforesaid acts of TVM and/or Your Store constitute trademark infringement, unfair competition and false designations of origin and false and/or misleading representations in violation of 15 U.S.C. §1125(a).

17. The aforesaid acts of TVM and/or Your Store were undertaken with actual knowledge of the prior use by Xacta of the trademark KINOKI, in connection with toxin collecting foot pads, and its exclusive rights in such mark, and with the willful and

deliberate intention of trading upon Xacta's reputation and good will as symbolized by its KINOKI trademark.

18. Xacta has been, and absent injunctive relief will continue to be, irreparably harmed by defendant's aforesaid actions, and has further suffered monetary damages in an amount to be determined at trial.

19. Xacta has no adequate remedy at law.

## **COUNT II**

(Common Law Trademark Infringement and Unfair Competition)

20. Xacta hereby repeats and re-alleges paragraphs 1 through 19 above as if fully set forth herein.

21. The aforesaid acts of TVM and/or Your Store constitute trademark infringement and unfair competition under the common law of the State of New York.

22. Defendant's aforesaid acts were undertaken with the willful intention of trading upon Xacta's reputation and good will.

23. Xacta has been, and absent injunctive relief will continue to be, irreparably harmed by defendant's aforesaid actions, and has further suffered monetary damages in an amount to be determined at trial.

24. Xacta has no adequate remedy at law.

## **COUNT III**

(Unfair and Deceptive Trade Practices)

25. Xacta hereby repeats and re-alleges paragraphs 1 through 24 above as if fully set forth herein.

26. By reason of its deliberate and willful acts as set forth above, which have

been undertaken in bad faith, defendant has engaged in deceptive trade practices in the conduct of its business in violation of N.Y. Gen. Bus. Law §349.

27. Xacta has been, and absent injunctive relief will continue to be, irreparably harmed by defendant's aforesaid actions, and has further suffered monetary damages in an amount to be determined at trial.

28. Xacta has no adequate remedy at law.

#### **COUNT IV**

##### **(Common Law Misappropriation)**

29. Xacta hereby repeats and re-alleges paragraphs 1 through 28 above as if fully set forth herein.

30. By undertaking the acts heretofore described, defendant has appropriated Xacta's KINOKI trademark for its own use and benefit, in violation of Xacta's rights under New York common law.

31. Defendant's misappropriation of Xacta's KINOKI trademark is and has been willful and intentional.

32. Xacta has been, and absent injunctive relief will continue to be, irreparably harmed by defendant's aforesaid actions, and has further suffered monetary damages in an amount to be determined at trial.

33. Xacta has no adequate remedy at law.

#### **PRAYER FOR RELIEF**

WHEREFORE, Xacta hereby prays for judgment against defendant as follows:

1. that defendant's aforesaid use of the KINOKI trademark constitutes:
  - (a) trademark infringement, unfair competition and the use of false

designations of origin and/or false misrepresentations, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a);

(b) trademark infringement, unfair competition and misappropriation in violation of the common law of the State of New York; and

(c) deceptive acts and practices in violation of N.Y. Gen. Bus. Law §349;

2. that defendant and its officers, directors, agents, servants, employees, attorneys and those persons in active concert or participation or otherwise in privity with it, or any of them, be preliminarily and permanently enjoined:

(a) from using in any manner the designation KINOKI and variations thereof, or any other name, term, phrase, mark, domain name, device or symbol which so resembles or is similar to Xacta's KINOKI trademark, so as to be likely to cause confusion, mistake or deception as to source, origin, sponsorship, approval, affiliation or the like, or as to be likely to dilute the distinctive quality of Xacta's trademark;

(b) from doing any other act which may, or is intended or designed or calculated to dilute, tarnish or disparage the distinctive quality of Xacta's KINOKI trademark or the reputation of Xacta;

3. that defendant deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, advertisements or other materials in the possession, custody or control of defendant which display or contain the designation KINOKI, and variations thereof, or which bear any other device, representation or statement in violation of the injunction herein requested by Plaintiff, and that defendant be ordered to deliver up for destruction all plates, molds, matrices and other means of making the same;

4. that defendant file with the Court and serve upon Xacta within thirty (30) days after service upon defendant of this Court's injunction issued in this action, a written report, signed under oath, setting forth in detail the manner and form in which defendant has complied with such injunction;

5. that defendant be required to account to Xacta for its profits and for such sum in addition thereto as the Court shall find just;

6. awarding Xacta its damages arising out of defendant's unlawful acts, together with an amount which is three times the amount found as actual damages;

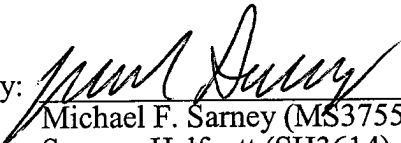
7. awarding Xacta punitive damages based on defendant's willful, wanton and intentional conduct;

8. awarding Xacta its costs and disbursements, including reasonable attorneys' fees; and

9. awarding Xacta such other and further relief as to the Court may seem just and proper.

April 23, 2008

XACTA 3000, INC.

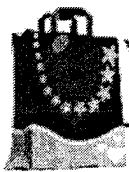
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## EXHIBIT A





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## **SALE** Deluxe Kinoki Detox Foot Pads

Availability: In Stock Usually Ships Same Day.

☒ Deluxe Kinoki Detox Foot Pads

**Wednesday Only Save 10% When You Order 2 Or More! Just Enter In Coupon Code "YourStore"**

### Free 30 Day Warranty

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### PRODUCT DESCRIPTION

ITEM: 778

WHATS INCLUDED | F

## Detox today and start feeling healthier!

Take advantage of the best value we have ever offered on TV or the Web. This value is yours for only \$18.95 and contains **14 Kinoki Kinoki Detox Pads** which is a week supply. Our world is full of toxins, pollutants, and harmful chemicals that accumulate in our body. While we obviously shower and bathe to keep our body clean how do we keep the inside of our body clean? We accumulate toxic and unwanted matter every day in our bodies, in our bones and muscles, in our fat and in our organs. Invariably these toxins and wastes and pollutants can lead to disease. These chemicals accumulate daily and gradually build up over time. The toxins can cause adverse chemical and physiological reactions which undermine our health and cause stress to our biochemical functions. If toxins continue to accumulate in the body faster than they are eliminated they can cause dysfunction of internal organs and diminish the functioning of our immune system. Our detox pad is specially formulated to detox your body, increase metabolism, restore balance to your nervous system, increase immunity and assist your body in healing itself naturally.

## Why Do Toxins Accumulate Near Your Feet?

The body naturally keeps toxins the furthest from the heart so they accumulate in extremities like the feet and hands. The heart has the job of providing life support to the body by pumping blood. Blood carries nutrients, water and oxygen to every cell and carries out toxins from cells to the kidneys, lungs, liver and skin for processing and excretion. This is commonly done through sweating, urinating and passing stool. Not all chemicals, acids and toxins leave the body, even if it is healthy.

## All Natural With Powerful Negative Ions

Formulated in Japan using all-natural tree extracts and powerful negative ions to rid the body of harmful toxins, metabolic wastes, microscopic parasites, mucous, chemicals, cellulite, and much more. This foot pad works on the principle of foot reflexology. Simply place the pads on the soles of your feet (or a targeted body part such as the shoulder or



before going to bed. By morning the pad will have absorbed toxins accumulated in your body from pollution, radiation exposure, etc., turning the white pad to a shade from grey to black. Use a fresh pad each night until the color on the pad becomes lighter and lighter, removed in the morning. Detoxify your body today, to potentially regain your health and vitality by promoting a strong immune system and healthy lymphatic functions naturally through the usage of the original Kinoki Detox Pads.

## Negative Ions And Their Benefits

Negative Ions have been shown in scientific studies to restore balance to the nervous system, boost immunity improve metabolism, and to assist the body in healing itself naturally. It is well known that consuming more alkaline foods, i.e. fruits and vegetables, is beneficial to human health. An acidic PH balance of the body, on the other hand, makes the body weak and susceptible to sickness. Acidification of the blood, which is caused by loss of electrons, can be prevented by Negative Electric Ions which contain an abundant amount of electrons improving the body's immunity and resistance to illnesses. This is the reason Negative Electric Ions products are becoming more and more popular nowadays.

### Negative ions are beneficial to the human body in four major ways:

- \* Strengthens the body's immune system
- \* Improves the permeability of the cell's prototype plasma membranes (metabolism)
- \* Reinforces collagen (tissues that are resilient and tension-related)
- \* Strengthens the functions of autonomic nerves

## How do you use the patches?

The patches are adhered like a big band aid to the soles of the feet overnight. Depending on the individual, the detox may require two to three weeks, or longer in the case of great toxicity build-ups. Most people use the pads on the arches of the feet to start with. They usually start becoming lighter in color as less "gooey" toxic fluid is extracted. At the same time, other zones of the body can be addressed and cleared (usually taking far less time). Depending on overall health, some people may notice positive health results fairly soon, within a few days. Others may take a couple of weeks to sense that something positive is happening. But it is of general consensus that the removal of toxicity build-ups within the body can lead to an increase in vibrant health and vitality.

### Includes

- 14 Detox Pads - 2 Week Supply
- Free Cell Phone Booster \$20 Value
- Free eCard \$20 value

### Features

- Detoxes your body
- Increase metabolism
- Restore balance to your nervous system
- Increase immunity
- Assists your body in healing itself naturally.

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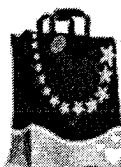
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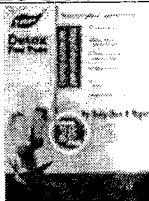
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Deluxe Kinoki Detox Foot Pads as low as **\$18.95**

☐ Deluxe Kinoki Detox Foot Pads

28 Deluxe Detox Foot Pads as low as **\$26.95**

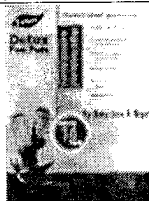


The body naturally keeps toxins the furthest from the heart so they accumulate in extremities like the feet and hands. The Kinoki Detox Food pads naturally eliminate toxins while you sleep!

Deluxe Kinoki Detox Foot Pads as low as **\$18.95**

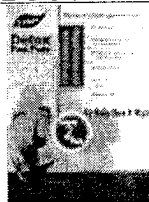
☐ Deluxe Kinoki Detox Foot Pads

14 Deluxe Detox Foot Pads as low as **\$18.95**



The body naturally keeps toxins the furthest from the heart so they accumulate in extremities like the feet and hands. The Kinoki Detox Food pads naturally eliminate toxins while you sleep!

2 Deluxe Detox Foot Pads as low as **\$0.00**



The body naturally keeps toxins the furthest from the heart so they accumulate in extremities like the feet and hands. The Kinoki Detox Food pads naturally eliminate toxins while you sleep!



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